Supreme Court, U.S.
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No. 96 OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

MONICA SKRZYPCZAK,
an Oklahoma citizen,

Petitioner,

vs.

YVONNE KAUGER, ROBERT E. LAVENDER,
ROBERT D. SIMMS, HARDY SUMMERS,
JOSEPH M. WATT, RALPH B. HODGES,
RUDOLPH HARGRAVE, ALMA WILSON,
and MARIAN P. OPALA, in their official capacities
as Justices of the Oklahoma Supreme Court,

Respondents.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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54 pp

QUESTIONS PRESENTED

1. Is the liberal standing rule established by the United States Supreme Court in *Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383 (1988), being applied to litigants within the Tenth Circuit?

2. Is Petitioner's standing allegation of having suffered an injury in fact sufficient to defeat a 12(b)(6) motion?

3. Does the existence of other avenues of First Amendment expression defeat Petitioner's 42 U.S.C. § 1983 claim if the challenged action is based on the content of the speech?

4. Does a federal district court sitting in the Tenth Circuit have subject matter jurisdiction to grant prospective injunctive relief (not damages) against state court judicial officers under *Pulliam v. Allen*, 466 U.S. 522 (1984)?

PARTIES TO THE PROCEEDINGS

Petitioner (Plaintiff below) is Monica Skrzypczak, an Oklahoma citizen.

Respondents (Defendants below) are Yvonne Kauger, Robert E. Lavender, Robert D. Simms, Hardy Summers, Joseph M. Watt, Ralph B. Hodges, Rudolph Hargrave, Alma Wilson, and Marian P. Opala, who have been sued in their official capacities as justices of the Oklahoma Supreme Court.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit was published at 92 F.3d 1050 (10th Cir. 1996).

JURISDICTIONAL STATEMENT

The final judgment of the United States Court of Appeals for the Tenth Circuit was entered on August 12, 1996, and Petitioner's timely Petition for Rehearing was denied on September 20, 1996. This petition is being filed within ninety days thereafter. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. CONST. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. U.S. CONST. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 42 U.S.C. § 1983

Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Acting under color of state law in their official capacities as state judicial officers, the Respondents violated Petitioner's First Amendment rights.

In *In re Initiative Petition No. 349, State Question No. 642*, Okla. Sup. Ct., Case No. 76,437[1], certain initiative

[1] 838 P.2d 1 (Okla. 1992).

petition proponents sought certification for a vote on a proposed ballot measure that would have restricted abortion in Oklahoma. During the initiative petition certification process, Respondents (by a 5-4 vote) prospectively declared the proposed measure unconstitutional based solely upon its content and struck it from the ballot. That act violated the civil rights of Petitioner herein who was not a party to the prior state court action nor in privity with the initiative petition proponents.

Seeking injunctive relief only, Petitioner filed a civil rights action in the Federal District Court for the Western District of Oklahoma which dismissed her federal question action for lack of subject matter jurisdiction. Petitioner appealed to the United States Court of Appeals for the Tenth Circuit. A three judge panel of the Tenth Circuit affirmed, albeit on a different *sua sponte* basis, *i.e.* that the Petitioner lacked standing, without even mentioning the Supreme Court case cited **in the Complaint** as partial basis for her allegation of standing. Skrzypczak's Petition for Rehearing and Suggestion for an En Banc Review was denied on September 20, 1996.

The Tenth Circuit's opinion misapprehends the Complaint filed below and may explain the result. Petitioner is not contending that she has a right to have any particular proposition on the ballot nor does she seek any relief that would give her such a right. Skrzypczak is only seeking First Amendment protection of a public forum denied her (and other ballot measure debaters) **solely** because the Respondents do not like the content of the issue presented for the debate and a vote. The relief Petitioner is seeking is not an order directing the Oklahoma Supreme Court to place Initiative Petition 349, State

Question 642, on the ballot, but rather a judgment: (1) requiring Respondents to resume the processing of said initiative petition without regard to its content (which may or may not result in this particular measure being placed on the ballot), and (2) preventing pre-submission review in the future of other initiative petitions based on their content.

REASONS FOR ALLOWING THE WRIT

SUMMARY OF THE REASONS

Under egregious circumstances, the United States Supreme Court can and should act as an error-correcting court. Occasionally, the Court grants certiorari for no reason other than error in the lower court decision. Chief Justice Rehnquist has stated that "the most common reason members of our Court vote to grant certiorari is that they doubt the correctness of the decision in the lower court."[2] If the error in the lower court's decision concerns an important constitutional problem, the grant of certiorari becomes more likely. For instance, in *Florida v. Rodriguez*, 469 U.S. 1 (1984), this Court reviewed the correctness of the trial court's "misapprehension of the controlling principles of [Fourth Amendment] law." 469 U.S. at 5. *See also*: *Williams v. Lee*, 358 U.S. 217 (1959); *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134 (1968); and *New York Transit Authority v. Beazer*, 440 U.S. 568 (1979).

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[2] Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 Mercer L. Rev. 1015, 1027 (1984).

Certiorari is necessary to maintain uniformity with this Court's prior decisions, because the Tenth Circuit's Opinion is contrary to:

(A) [on the standing issue] the controlling 42 U.S.C. § 1983 civil rights free speech case of *Virginia v. American Booksellers Assn., Inc.*, 484 U.S. 383, 392-93 (1988), which established an exception to the general standing rule applicable in free speech civil rights cases like *American Booksellers* and the case at bar;

(B) [on the quantum of speech issue] the controlling 42 U.S.C. § 1983 civil rights free speech case of *Meyer v. Grant*, 486 U.S. 414, 423-424 (1988), which (contrary to the Tenth Circuit's pronouncement) held that the existence of other avenues of expression for initiative petition speakers[3] to disseminate their ideas does not remove their initiative petition speech from the bounds of First Amendment protection. Initiative petition speakers are constitutionally protected in selecting what they believe to be the most effective means for delivering a message, i.e. the initiative petition forum. *Meyer*, 486 U.S. at 423-24. Furthermore, content-based restrictions are unconstitutional unless they are narrowly tailored to serve a compelling governmental interest. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Only

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[3] The phrase "initiative petition speakers" refers to all those who employ First Amendment speech during the initiative petition process from the filing of the petition through the vote.

content-neutral regulations withstand scrutiny if they " 'leave open ample alternative channels for communication.' " *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984);

(C) [on the subject matter jurisdiction issue] the controlling 42 U.S.C. § 1983 civil rights case of *Pulliam v. Allen*, 466 U.S. 522 (1984), which held that, while state judicial officers enjoy a substantial degree of immunity with regard to their official acts, injunctive relief is available to prevent state judicial officers from unconstitutionally depriving persons of their civil rights. *In Pulliam*, this Court authorized the exercise of prospective injunctive relief by a federal district court against state judicial officers whose actions have deprived persons of their constitutional rights. This is precisely the nature of the relief sought by Petitioner in her Complaint.

A decision from this Court clarifying the civil rights protection to be afforded the First Amendment advocacy attendant to the initiative petition process would protect freedom of expression in all twenty-four initiative petition jurisdictions. This case should be heard because of the exceptional public importance of core political speech in the "direct democracy" (*i.e.* initiative petition) forum, and because of the Tenth Circuit's failure to even discuss the controlling standing case of *American Booksellers*.

ARGUMENTS

The Moving Target

Respondents' counsel moved to dismiss this case at the trial level based on the affirmative defense of *res judicata*. The Western District of Oklahoma dismissed this 42 U.S.C. § 1983 case on the grounds of subject matter jurisdiction. [App. 16] Skrzypczak prosecuted her appeal therefrom to the Tenth Circuit Court of Appeals on the grounds that a federal district court has jurisdiction to hear a complaint alleging a federal civil rights action seeking prospective equitable relief (not damages) against state judicial officers who, acting under color of state law, deprived the Petitioner of her federally guaranteed Constitutional rights. The Tenth Circuit affirmed the dismissal albeit on yet another basis: standing.[4]

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[4] In *Leavitt v. Jane L.*, 518 U.S. ___, 116 S.Ct. 2068, 2072, 135 L.Ed 2d 443, 450 (1996), this Court stated:

> The fact observed by the dissent, that the 'underlying substantive issue in this case' is a controversial one, generating 'a kind of 'hydraulic pressure' that motivates ad hoc decision-making,' ***post***, at ___-___ [116 S.Ct. at 2073, 135 L.Ed 2d at 451] provides a greater, not a lesser, justification for reversing state law determinations that seem plainly wrong.

The issue in *Leavitt* was abortion; whereas, the issue in this case is core political speech. Nevertheless, Petitioner has been forced to respond after the fact to three different "ad hoc" dismissal theories.

The Three Questions

Certiorari should be granted if the following three questions can be answered in the affirmative:

1. Did Petitioner allege a case involving core political speech protected by *Meyer?*
2. If yes, does Petitioner have standing to prosecute the core political speech case?
3. If yes, does a federal district court have subject matter jurisdiction to grant prospective injunctive relief (not damages) under *Pulliam*?

Misunderstanding *Meyer*

The first question to be addressed is whether Petitioner alleged a case involving core political speech protected by *Meyer.* The Tenth Circuit stated at page 6 of the opinion:

> [Skrzypczak] is free to argue against legalized abortion. . . . Her right to free speech in no way depends on the presence of SQ 642 on the ballot.

The Tenth Circuit continued at page 7 of the opinion:

> *The Meyer* case is inapposite because the law at issue in that case curtailed free speech – proponents of an initiative petition were forbidden to pay anyone to disseminate their message and gather signatures for their petition. In this case, the Oklahoma Supreme Court has done nothing to restrict speech. . . .

The Tenth Circuit misapprehends *Meyer.* The claim in *Meyer* was that a prohibition on the payment of initiative

petition circulators would reduce the domain of circulators to a few volunteers; consequently, the quantum of speech on the issue between circulators and potential signers would be reduced.[5] This Court stated in *Meyer:*

> The Colorado Supreme Court has itself recognized that the prohibition against the use of paid circulators has the inevitable effect of **reducing the total quantum of speech** on a public issue.

Meyer, 486 U.S. at 423 *(emphasis added).* This Court continued:

> Appellants argue that even if the statute imposes some limitation on First Amendment expression, the burden is permissible because other avenues of expression remain open. . . .
>
> * * *
>
> That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection. . . . That it leaves open "more burdensome" avenues of communication, does not relieve its burden on First Amendment expression. *[Citations omitted.]* The First Amendment protects appellees' right not only to advocate their cause **but also to select what they believe to be the most effective means for so doing.**

Meyer, 486 U.S. at 424 *(emphasis added).*

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[5] In *Meyer,* the Tenth Circuit Court of Appeals discussed at some length how the quantity of speech on an issue would be reduced by compelling circulation of initiative petitions through volunteers rather than paid circulators. *Grant v. Meyer,* 828 F.2d 1446, 1452-54 (10th Cir. 1987).

The Tenth Circuit said that Petitioner is free to argue against legalized abortion and that her free speech rights are in no way dependent upon the presence of State Question 642 on the ballot. It is also true that the proponents in *Meyer* were free to speak on their issue outside of the initiative petition forum and their right of free speech was in no way dependent upon the presence of their issue on the ballot. Nonetheless, the Tenth Circuit and then this Court upheld the Colorado plaintiffs' quantum of speech claim.[6] While nothing prohibits Petitioner from addressing listeners one-by-one on the sidewalk, to so constrain her speech would reduce the quantum of speech on the issue, and would fly in the face of the "quantum of speech" rule of law established by *Meyer*. *Meyer* is applicable and is not (as the Tenth Circuit attempted to characterize it) inapposite to Petitioner's claims. Furthermore, the availability of other avenues of expression is a viable argument only in the context of content neutral restrictions. Content-based restrictions are unconstitutional unless they are narrowly tailored to serve a compelling government interest. *Perry*, 460 U.S. at

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[6] As was stated in the *Hearings Before the Subcommittee on the Constitution of the Committee on the Judiciary of the United States Senate*, in re S.J. Res. 67, December 13-14, 1977, U.S. Government Printing Office, at page 14:

> Initiative gives people the power to get a fair hearing about an issue which concerns them. If there are enough citizens willing to sign petitions, to put a question to a public vote, then that issue, at the very least, will be fully debated and addressed in a public forum.

45. Content-neutral regulations on the other hand, withstand scrutiny if they "leave open ample alternative channels for communication." *Ward*, 491 U.S. at 791. In this case, the Respondents' unconstitutional practice of pre-submission review is content intensive.

Picking and Choosing

Petitioner is also claiming that Respondents are picking and choosing among initiatives **based upon their content,** thus violating the First Amendment. Pre-submission content review by the Respondents is anything but a content neutral, time/place/manner restriction. The Respondents decide, based on the content of the state question, whether there will be a debate and a vote upon the measure.

In some cases, the Respondents have recognized the unconstitutionality of a proposed measure, yet allowed the debate and vote to occur, as they did in the federal term limits case, *In re Initiative Petition No. 360, State Question No. 662*, 879 P.2d 810 (Okla. 1994). Consequently, there are also equal protection considerations involved with pre-submission content review. *Police Department v. Mosley*, 408 U.S. 92 (1972).

What About *American Booksellers?*

The second question is whether Petitioner has standing to prosecute the core political speech case at bar. When deciding the standing issue, the Tenth Circuit discussed *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982);

Lujan v. Defenders of Wildlife, 504 U.S. ___, 112 S.Ct. 2130, 119 L.Ed 2d 351 (1992); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990); *Hackford v. Babbitt*, 14 F.3d 1457 (10th Cir. 1994); and *Warth v. Seldin*, 422 U.S. 490 (1975). None of these cases discuss the liberalized standing rule established in *American Booksellers* by this Court for First Amendment civil rights actions. The dispositive standing rule was articulated by this Court in *American Booksellers* at 484 U.S. 392-93:

> We **first** address plaintiffs' standing to bring suit. The State argued before the District Court that plaintiffs lacked standing to bring a pre-enforcement facial challenge, alleging that plaintiffs did not suffer sufficient harm, and what harm they did suffer was economic, not speech related.
>
> * * *
>
> To bring a cause of action in federal court requires that plaintiffs establish at an irreducible minimum an injury in fact; that is, there must be some "threatened or actual injury resulting from the putatively illegal action . . . ." [Citations omitted].
>
> * * *
>
> Even if an injury in fact is demonstrated, the usual rule is that a party may assert only a violation of its own rights. However, in the First Amendment context, "litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."

> *[Citations omitted.]* This exception applies here, as plaintiffs have alleged an infringement of the First Amendment rights of bookbuyers.

The Tenth Circuit's opinion not only did not regard the explicit language of *American Booksellers* as determinative – it did not even use it as the point of departure for addressing the standing question.[7]

Nevertheless, Petitioner has alleged "injury in fact" to herself (as well as other initiative petition debaters).[8] In Paragraphs 2.1(e)(1) [App. 21], 3.19-25 [App. 26-27], and 3.26-3.30 [App. 27], Petitioner identified the injury she suffered as a result of the Respondents "acting under color of state law." In Paragraph 2.1(e)(2) [App. 21], she also alleged standing to prosecute the free speech claims of others not before the court. The Tenth Circuit erred in departing from this Court's teaching in *American Booksellers*.

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[7] Petitioner alleged in Paragraph 2.1 (e) on page 3 of her Complaint [App. 21-22] that she has standing to prosecute this First Amendment civil rights case and specifically cited *American Booksellers* on the face of the Complaint.

[8] The allegations within Skrzypczak's Complaint should provide the benchmark for ruling on Respondents' Motion to Dismiss. Because "on a **motion** to **dismiss** we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lewis v. Casey*, ___ U.S. ___, 116 S.Ct. 2174, 2183, 135 L.Ed.2d 606 (1996) quoting from *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2136-2137, 119 L.Ed.2d 351 (1992).

Pulliam and Subject Matter Jurisdiction

The last question is whether a federal district court has subject matter jurisdiction under 42 U.S.C. § 1983 to grant prospective injunctive relief (not damages) under *Pulliam*. Petitioner has not alleged that the Respondents incorrectly *adjudicated* her civil rights in the State Question 642 case to which she was not a party, rather Petitioner alleges that the Respondents *violated* her rights (and the rights of others) by virtue of Respondents' pre-submission content review. In *Pulliam,* this Court held that, while state judicial officers enjoy a substantial degree of immunity with regard to their official acts, injunctive relief is available to prevent state judicial officers from unconstitutionally depriving the People of their civil rights. Consequently, this Court authorized the exercise of prospective injunctive relief by a federal district court against state judicial officers whose actions deprived persons of their constitutional rights. That relief should likewise be available to Petitioner.

CONCLUSION

Chilling Effect

The *dicta* contained within the Opinion of the Tenth Circuit (which has been published) may be seized upon by the Respondents to justify pre-submission content review in future cases. This will present any future initiative petition proponent with a dilemma. If a proponent **files** a 1983 civil rights action in the Western District of

Oklahoma seeking to enjoin the Respondents' pre-submission content review of an initiative petition, the Western District of Oklahoma may dismiss the case based on the *dicta* in the Tenth Circuit's published Opinion. On the other hand, if a proponent **files** an initiative petition, circulates it at great expense, and obtains the requisite number of signatures, the Respondents may strike the matter from the ballot based on the *dicta* in the Tenth Circuit's published Opinion, in which case, the proponent's only remedy would be to seek *certiorari* review from this Court. Since only 3-4% of *certiorari* petitions are granted,[9] it is highly probable that the Respondents' striking of a measure from the ballot will never be examined by this Court. As a consequence, the **quantum of debate** that would have been generated from the date of the submission of the signatures through the vote of the People upon the initiative petition will be forever reduced because the measure will never appear on the ballot.

Petitioner and other speakers for *and* against State Question 642 did not enjoy the quantum of speech that would have occurred on this issue had the Respondents not *sua sponte* struck the measure from the ballot. Radio debates would have been aired, letters to the editor would have been written, and the quantum of speech produced by the initiative petition process would have exponentially increased. The action by the Respondents had the immediate effect of decimating the quantum of speech on the issue and thus deprived Petitioner of her

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[9] Stem, Gressman & Shappiro, *Supreme Court Practice 6th Ed.*, § 4.1 at page 192

First Amendment constitutional rights, as well as the freedom of expression of other debaters. Unless *certiorari* is granted, Respondents will not only have silenced State Question 642 speakers, but will hereafter sit as censors of the core political speech surrounding state questions initiated by Oklahoma voters.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MONICA SKRZYPCZAK, an Oklahoma citizen, Plaintiff-Appellant,	)	
v.	)	No. 95-6156
YVONNE KAUGER, ROBERT E. LAVENDER, ROBERT D. SIMMS, HARDY SUMMERS, JOSEPH M. WATT, RALPH B. HODGES, RUDOLPH HARGRAVE, ALMA WILSON, and MARIAN P. OPALA, in their official capacities as Justices of the Oklahoma Supreme Court, Defendants-Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D. Ct. No. CIV-94-1236L)

(Filed Aug. 12, 1996)

Michael Minnis (David Mccullough with him on the briefs), Michael Minnis & Associates, Oklahoma City, Oklahoma, appearing for the Appellant.

Scott D. Boughton, Assistant Attorney General (W.A. Drew Edmondson, Attorney General of Oklahoma, with

him on the brief), Oklahoma City, Oklahoma, appearing for the Appellees.

Before SEYMOUR, Chief Judge, PORFILIO and TACHA, Circuit Judges.

TACHA, Circuit Judge.

In 1993, the Oklahoma Supreme Court held that a proposed initiative restricting abortion, State Question 642 ("SQ 642"), could not be placed on the ballot because it was unconstitutional. *In re Initiative Petition No. 349*, 838 P.2d 1, 7-8 (Okla. 1992), *cert. denied*, 113 S. Ct. 1028 (1993). Monica Skrzypczak, who was not a party to that action, filed this suit against the justices of the Oklahoma Supreme Court alleging that the court's refusal to place SQ 642 on the ballot constituted a prior restraint on speech. The district court granted the Oklahoma Supreme Court's motion to dismiss for lack of subject matter jurisdiction on the ground that a federal district court does not have the authority to review final decisions of state supreme courts. Our jurisdiction arises under 28 U.S.C. § 1291. We affirm the decision of the district court, but on a different ground. We hold that Skrzypczak lacks standing to bring this suit because she failed to allege injury in fact.

BACKGROUND

The Oklahoma Coalition to Restrict Abortion, Inc., and Fred W. Sellers, Jr. ("the proponents") filed initiative

petition pamphlets with the Oklahoma Secretary of State on June 29, 1990. The proposed initiative, SQ 642, criminalized abortion, allowing it only in four circumstances: (1) where continuing the pregnancy would cause grave impairment of the woman's physical or mental health; (2) in cases of rape, as defined by Okla. Stat. tit. 21 § 1111 (West 1988); (3) in cases of incest, as defined in Okla. Stat. tit. 21 § 885 (West 1988); and (4) in cases of grave physical or mental defect of the fetus. Two individuals, Nancy Feldman and Kim Little, filed a protest challenging the constitutionality of SQ 642. They later withdrew their claim.

On July 14, 1992, the Oklahoma Supreme Court *sua sponte* ordered the proponents, as well as Feldman and Little, to brief the impact of *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), on the constitutionality of SQ 642. The proponents conceded in their brief that SQ 642 was unconstitutional, but argued that the Oklahoma Supreme Court should allow the initiative to go forward as an exercise in political advocacy. The Oklahoma Supreme Court held that SQ 642 was unconstitutional and thus could not be placed on the ballot. *In Re Initiative Petition No. 349*, 838 P.2d at 7-8. The Oklahoma Supreme Court further held that pre-submission review of the constitutionality of initiative petitions is appropriate, and rejected the proponents' argument that pre-submission review violates their free speech rights. *Id.* at 8-10. The proponents petitioned for certiorari, arguing that pre-submission review of the initiative petition constitutes a prior restraint on speech. The United States Supreme Court

declined to review the Oklahoma Supreme Court's decision. *Oklahoma Coalition to Restrict Abortion, Inc. v. Feldman*, 113 S. Ct. 1028 (1993).

On August 3, 1994, Skrzypczak filed this suit against the justices of the Oklahoma Supreme Court. She alleged that she was neither a party nor the agent of any party involved in *In re Initiative Petition No. 349*, but that she would advocate the passage or defeat of SQ 642 if it were placed on the ballot. She sought both a declaration that pre-submission content review of initiative petitions constitutes a prior restraint on core political speech and an injunction compelling the Oklahoma Supreme Court to complete the initiative petition process for SQ 642 and refrain from performing pre-submission reviews in the future. The Oklahoma Supreme Court moved to dismiss the complaint for lack of subject matter jurisdiction. The district court granted the motion, noting that Skrzypczak advanced the same arguments that had been submitted to the Oklahoma Supreme Court and the United States Supreme Court. The court further stated that Skrzypczak's complaint, in effect, asked the court to overrule the Oklahoma Supreme Court's decision in *In re Initiative Petition No. 349*. The court reasoned that because a federal district court does not have authority to directly review final judgments of a state court in judicial proceedings, *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), it consequently lacked subject matter jurisdiction over the case.

DISCUSSION

Although neither side raises the issue, we must determine whether Skrzypczak has standing to raise her claims. We are obliged to address standing *sua sponte* because it involves a constitutional limitation on a federal court's jurisdiction, *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1497 (10th Cir. 1995), and "federal courts are under an independent obligation to examine their own jurisdiction," *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). The Constitution limits the jurisdiction of federal courts to cases and controversies. U.S. Const. art. III, § 2, cl. 1; *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). The case-or-controversy limitation requires, among other things, that a plaintiff have standing. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992). A party has standing when (1) she has suffered an injury in fact, (2) there is a causal connection between the injury and the conduct complained of, and (3) it is likely that the injury will be redressed by a favorable decision. *Id.* A plaintiff must support the elements of standing "with the manner and degree of evidence required at the successive stages of the litigation." *Id.* "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim. . . . ' " *Id.* at 2137 (quoting *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). We must accept as true all well-pleaded facts and construe all reasonable allegations in the light most favorable to the plaintiff. *Hackford v. Babbitt*, 14 F.3d 1457,

1465 (10th Cir. 1994); *see also Warth v. Seldin*, 422 U.S. 490, 501 (1975).

We hold that Skrzypczak lacks standing because her complaint fails to allege an injury in fact. Injury in fact requires invasion of a legally-protected interest. *Defenders of Wildlife*, 112 S. Ct. at 2136. Skrzypczak asserts that her legally-protected interest in free speech is infringed by pre-submission content review of initiative petitions. Thus, she appears to claim that her right to free speech depends upon SQ 642 going forward to a popular vote.

Skrzypczak mistakenly conflates her legally-protected interest in free speech with her personal desire to have SQ 642 on the ballot. In removing SQ 642 from the ballot, the Oklahoma Supreme Court has not prevented Skrzypczak from speaking on any subject. She is free to argue against legalized abortion, to contend that pre-submission content review of initiative petitions is unconstitutional, or to speak publicly on any other issue. Her right to free speech in no way depends on the presence of SQ 642 on the ballot. Moreover, she cites no law, and we find none, establishing a right to have a particular proposition on the ballot. Because she has failed to assert a legally-cognizable interest, we hold that Skrzypczak lacks standing to assert her claim.

The Supreme Court's holding in *Meyer v. Grant*, 486 U.S. 414 (1988), does not undercut our conclusion. In *Meyer*, the Supreme Court held that a Colorado law forbidding initiative proponents from paying people to circulate petitions violated the First Amendment. The Court described the speech involved in circulating initiative petitions as "core political speech." *Id.* at 421-22. The

Court noted that Colorado's prohibition against paying petition circulators imposed two restrictions on political expression: (1) it limited the number of messengers and thus limited the size of the audience that could be reached and (2) it diminished the likelihood that the petitioners would gain the number of signatures necessary to place the measure on the ballot, thus limiting their ability to promote statewide discussion of the issues raised by the initiative petition. *Id.* at 422-23. The Court also held that the state's power to ban initiatives entirely does not include the power to limit political speech regarding issues raised in initiative petitions. *Id.* at 424-25.

The *Meyer* case is inapposite because the law at issue in that case curtailed free speech – proponents of an initiative were forbidden to pay anyone to disseminate their message and gather signatures for their petition. In this case, the Oklahoma Supreme Court has done nothing to restrict speech: neither Skrzypczak nor anyone else has been silenced by pre-submission content review. Moreover, there is nothing in *Meyer* suggesting that there is a protected right to have a particular initiative on the ballot.

Reading the complaint liberally and construing all reasonable allegations in Skrzypczak's favor, we hold that she has failed to identify a legally-protected interest that has been invaded and thus has failed to allege an injury in fact. For this reason, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MONICA SKRZYPCZAK, an Oklahoma citizen, Plaintiff,	)	
v.	)	
YVONNE KAUGER, ROBERT E. LAVENDER, ROBERT D. SIMMS, HARDY SUMMERS, JOSEPH M. WATT, RALPH B. HODGES, RUDOLPH HARGRAVE, ALMA WILSON and MARIAN P. OPALA, in their official capacities as Justices of the Oklahoma Supreme Court, Defendants.	)	No. CIV-94-1236-L

ORDER

(Filed Feb. 24, 1995)

This action arises out of the Oklahoma Supreme Court's order holding Initiative Petition No. 349 ("the Petition") invalid. *See In re Initiative Petition 349,* 838 P.2d 1 (Okla. 1992), *cert. denied,* ___ U.S. ___, 113 S.Ct. 1028 (1993). The Petition (which was numbered for ballot purposes as State Question 642) "*criminalizes* and *absolutely prohibits* abortions except in four narrow circumstances: 1) grave impairment of the female's physical or mental health; 2) rape as defined in 21 O.S. 1991 § 1111; 3) incest as defined in 21 O.S. 1991 § 885; and 4) grave physical, or mental defect of the fetus." *Id.* at 6 (emphasis in original). The Oklahoma Supreme Court held that the Petition was

unconstitutional and therefore invalid. *Id.* at 7. The Court reasoned that:

> The right of the initiative is precious and it is one which we are zealous to preserve to the fullest measure of the spirit and the letter of the law. All doubt as to the construction of pertinent provisions is resolved in favor of the initiative. However, the right of the initiative is not absolute. There are constitutional and statutory limits on the process. After [*Planned Parenthood v.*] *Casey,* it became incontrovertibly clear that the petition could not withstand a constitutional challenge. Although state law may afford greater rights than those guaranteed by federal law, it may not curtail rights guaranteed by federal law or the United States Constitution.

In re Initiative Petition No. 349, 838 P.2d at 12.

On August 3, 1994, plaintiff, Monica Skrzypczak, filed this action seeking declaratory and injunctive relief against the members of the Oklahoma Supreme Court in their official capacity. Contending that the Court's refusal to place the Petition on the ballot constitutes a prior restraint on core political speech, plaintiff seeks

> (a) declaratory relief holding initiative petition pre-submission content review [based on 34 O.S. § 8 and OKLA. CONST. art. II, § 1, as construed and applied] and licensing to be a prior restraint on core political speech in violation of the First and Fourteenth Amendments, and (b) that a permanent, prospective mandatory injunction issue compelling the Defendants to complete the State Question 642 initiative petition process without reference to the content thereof.

Complaint at ¶ 3.32.

This matter is before the court on defendants' motion to dismiss for lack of jurisdiction. Defendants argue that this court does not have the authority to review final decisions of the Oklahoma Supreme Court. In ruling on defendants' motion, the court accepts the allegations in the complaint as true. *Holt v. United States*, ___ F.3d ___, 1995 WL 34196 (10th Cir. 1995).

BACKGROUND

Pursuant to Oklahoma law governing the initiative petition process, the proponents of the Petition ("proponents") filed petition pamphlets with the Oklahoma Secretary of State on June 29, 1990. The petition pamphlets were circulated from June 29, 1990 through September 27, 1990 and 106,357 signatures were obtained. On December 17, 1990, the Oklahoma Supreme Court entered an order that started the time period for filing challenges to the Petition. On December 31, 1990, Nancy Feldman and Kim Little filed a protest to the legal sufficiency of the Petition. In their protest, Feldman and Little specifically challenged the constitutionality of the Petition. On January 4, 1991, Janet Taliaferro, Andrew Tevington and Pam Fleischaker filed an objection challenging the numerical sufficiency of the signatures.

On March 23, 1992, Feldman and Little filed a brief in which they withdrew their federal and state constitutional claims. Feldman and Little stated that:

> In their Petition to Protest, the Protestants Feldman and Little raised many federal and state Constitutional issues. Protestants also noted that an evidentiary hearing would be required to so

> [sic] these issues could be properly explored by the Court. Unfortunately, the Court has not granted the Protestants an opportunity for an evidentiary hearing. As a consequence, the Protestants hereby withdraw their federal and state Constitutional claims. Federal Constitutional issues are raised below, but they are raised solely for the proposition of showing what current federal precedent is on abortion to demonstrate that State Question 642, if approved, will not effect any restrictions on first and second tri-mester abortions unless current federal abortion precedents are overturned.

Brief of Protestants Feldman & Little in Support of their Protest to Initiative Petition No. 349, State Question 642 at 2-3 (Okla. filed Mar. 23, 1992). Thereafter, the United States Supreme Court issued its decision in *Planned Parenthood v. Casey*, ___ U.S. ___, 112 S.Ct. 2791 (1992). In light of that ruling and the fact that "[t]he constitutionality of Initiative Petition No. 349 (abortion petition/petition) is challenged as an issue by the protestants Feldman and Little in their briefs", the Oklahoma Supreme Court directed the parties to file simultaneous briefs on the constitutionality of the Petition. *In re Initiative Petition No. 349*, No. 76,437, slip op. at 1 (Okla. July 14, 1992).

> In their July 24, 1992, brief, the 642 Proponents relied on *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988), for the proposition that the expression attendant to the initiative petition process, from circulation through voting is core political speech, and cited the Supreme Court's express rejection in *Meyer* of

> the states' rights argument that, because the initiative is a state-created right, the state may impose limitations on that right.

Complaint at ¶ 3.12.

On August 4, 1992, the Oklahoma Supreme Court issued its ruling declaring the Petition unconstitutional. The Court found that "if a properly preserved constitutional challenge is leveled at a proposed law and a ruling on the issue would prevent a useless election resulting in the enactment of an unconstitutional statute, this Court has the authority, as well as the responsibility, to decide the matter." *In re Initiative Petition No. 349,* 838 P.2d at 8. The Court addressed and rejected proponents' core political speech argument. *See id.* at 9-11. The proponents timely filed a petition for writ of certiorari in the United States Supreme Court in which they argued that the actions of the Oklahoma Supreme Court constituted a prior restraint on core political speech. The United States Supreme Court denied the petition on January 11, 1993. *See Oklahoma Coalition to Restrict Abortion, Inc. v. Feldman,* ___ U.S. ___, 113 S.Ct. 1028 (1993). Plaintiff filed this action on August 3, 1994.

DISCUSSION

It is well-established that:

> A federal district court does not have the authority to review final judgments of a state court in judicial proceedings; such review may be had only in the United States Supreme Court. 28 U.S.C. § 1257 (1982). *See District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 482, 103

> S.Ct. 1303, 1314-15, 75 L.Ed.2d 206 (1983). Federal district courts do not have jurisdiction "over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." *Feldman*, 460 U.S. at 486, 103 S.Ct. at 1317.

Van Sickle v. Holloway, 791 F.2d 1431, 1436 (10th Cir. 1986). Plaintiff argues that this well-settled rule does not apply in this case because defendants were not acting in a judicial capacity when they issued their ruling in *In re Initiative Petition No. 349*. Rather, plaintiff contends defendants' ruling was issued "in a non-judicial, ministerial proceeding to which plaintiff was not a party." Plaintiff's Objection to Motion to Dismiss at 5.

In determining whether a proceeding is judicial in nature, "[t]he form of the proceedings is not significant. It is the nature and effect which is controlling." *In re Summers*, 325 U.S. 561, 567 (1945). A judicial proceeding "investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." *Prentis v. Atlantic Coast Line*, 211 U.S. 210, 226 (1908). In contrast, a purely ministerial task encompasses no discretion or reasoning.

In ruling that the Petition was unconstitutional, the Oklahoma Supreme Court determined the validity of the Petition in light of existing law. In making its ruling, the Court considered explicit legal arguments raised by the parties and examined the Petition in light of existing precedent. As the United States Supreme Court said in a similar context, "This is the essence of a judicial proceeding." *Feldman*, 460 U.S. at 462.

This court concludes that it is without jurisdiction to review the Oklahoma Supreme Court's final decision in *In re Initiative Petition No. 349*. Review of that decision was proper only in the United States Supreme Court, which declined review. In this action, plaintiff advances the same arguments that were previously submitted to both the Oklahoma Supreme Court and the United States Supreme Court. Plaintiff, in effect, asks this court not only to overrule a decision of the Oklahoma Supreme Court, but also to review the decision of the United States Supreme Court denying review. As a court of limited jurisdiction, this court is not permitted to review those decisions. It makes no difference that plaintiff contends that the Oklahoma Supreme Court's action was unconstitutional. This court does not have the power "to review a final decision of the highest court of a jurisdiction in a particular case." *Feldman*, 460 U.S. at 486. In addition, this court cannot grant the injunctive relief plaintiff seeks. Federal district courts have no authority "to 'direct state courts or their judicial officers in the performance of their duties.' " *Van Sickle*, 791 F.2d at 1436 n.5 (*quoting Haggard v. State of Tennessee*, 421 F.2d 1384, 1386 (6th Cir. 1970)).

CONCLUSION

Defendants' Motion to Dismiss (Docket No. 12) is GRANTED. In light of this ruling, the court issues no opinion with respect to the merits of plaintiff's Motion for Summary Judgment (Docket No. 3).

It is so ordered this 24th day of February, 1995.

/s/ Tim Leonard
TIM LEONARD
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
WESTERN DISTRICT OF OKLAHOMA

MONICA SKRZYPCZAK, an Oklahoma Citizen, Plaintiff,	)	
v.	)	No. CIV-94-1236-L
YVONNE KAUGER, ROBERT E. LAVENDER, ROBERT D. SIMMS, HARDY SUMMERS, JOSEPH M. WATT, RALPH B. HODGES, RUDOLPH HARGRAVE, ALMA WILSON and MARIAN P. OPALA, in their official capacities as Justices of the Oklahoma Supreme Court, Defendants.	)	

JUDGMENT

(Filed Feb. 24, 1995)

Pursuant to the Order issued this date, this action is DISMISSED for lack of jurisdiction.

Entered this 24th day of February, 1995.

/s/ Tim Leonard
TIM LEONARD
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MONICA SKRZYPCZAK, an Oklahoma Citizen, Plaintiff -Appellants, v. YVONNE KAUGER, ROBERT E. LAVENDER, ROBERT D. SIMMS, HARDY SUMMERS, JOSEPH M. WATT, RALPH B. HODGES, RUDOLPH HARGRAVE, ALMA WILSON and MARIAN P. OPALA, in their official capacities as Justices of the Oklahoma Supreme Court, Defendants - Appellees.	)	No. 95-6156

ORDER

Entered September 15, 1996

Before SEYMOUR, Chief Judge, PORFILIO, and TACHA, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing is denied.

Entered for the Court

PATRICK FISHER, Clerk

By: /s/ Denise Cordova
Denise Cordova
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MONICA SKRZYPCZAK, an Oklahoma citizen, Plaintiff, vs. YVONNE KAUGER, ROBERT E. LAVENDER, ROBERT D. SIMMS, HARDY SUMMERS, JOSEPH M. WATT, RALPH B. HODGES, RUDOLPH HARGRAVE, ALMA WILSON, and MARIAN P. OPALA, in their official capacities as Justices of the Oklahoma Supreme Court, Defendants.	)	Case No. _____ CIV-94-1236-L

CIVIL RIGHTS COMPLAINT

(Filed Aug. 03, 1994)

COMES NOW the Plaintiff and for her Complaint against the Defendants, alleges:

I

JURISDICTION AND VENUE

1.1 This is a civil rights action against the Defendants in their official capacities as Oklahoma Supreme Court Justices.

1.2 Acting under color of state law, the Defendants' pre-submission content review and licensing of initiative petitions subjects the Plaintiff or causes the Plaintiff to be subjected to the deprivation of her freedom of expression rights secured by the First and Fourteenth Amendments of the United States Constitution.

1.3 This civil rights action seeks:

(a) a declaratory judgment;

(b) permanent, prospective, mandatory injunctive relief; and

(c) permanent, prospective preventative injunctive relief.

1.4 This Court has jurisdiction over Plaintiff's claims for relief pursuant to the Freedom of Expression Clause of the First Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983 [civil rights], 28 U.S.C. § 1343(3) [civil rights], 28 U.S.C. §§ 2201 & 2202 [declaratory judgments], Fed.R.Civ.P. 57 [declaratory judgments], 42 U.S.C. § 1988 [attorneys' fees and costs from the State – not the individual Defendants – *Pulliam v. Allen*, 466 U.S. 522; 104 S. Ct. 1970; 80 L.Ed.2d 565 (1984) – in this case of first impression – *Thomas v. Metroflight, Inc.*, 814 F.2d 1506 (10th Cir. 1987)], and 28 U.S.C. § 1991 [federal questions].

1.5 Venue is proper in the United States District Court for the Western District of Oklahoma pursuant to 28 U.S.C. § 1391(b); inasmuch as, the principal offices of the Defendants are located in the Western District.

II

PARTIES

2.1 The Plaintiff, Monica Skrzypczak:

(a) is an Oklahoma citizen;

(b) is an Oklahoma registered voter;

(c) is an advocate and voter in re the abortion debate;

(d) was not a party to nor the agent of any party in the Oklahoma Supreme Court original jurisdiction (not appellate jurisdiction) case of:

In re:	)	
INITIATIVE PETITION NO. 349	)	Case No. 76,437
STATE QUESTION NO. 642	)	

[the abortion Initiative Petition];

(e) has standing to prosecute this First Amendment, freedom of expression case to challenge speech restriction, i.e., pre-submission content review and licensing of initiative petitions because:

(1) her own rights of free expression have been, are, and will continue to be violated by pre-submission content review and licensing of initiative petitions, and

(2) the very existence of pre-submission content review and licensing of initiative petitions "may cause others not before the court to refrain from constitutionally protected speech or expression," [*Virginia v. American Booksellers Assoc., Inc.* 484

U.S. 383, 392-93; 108 S. Ct. 636, 643; 98 L.Ed.2d 782, 793-94 (1988)]; and

(g) in not barred by the *Younger v. Harris*, 401 U.S. 37; 91 S. Ct. 746; 27 L.Ed.2d 669 (1971), abstention doctrine to prosecute the claims alleged *infra* because this federal Plaintiff was not a party nor the agent of a party in the aforementioned Oklahoma Supreme Court original jurisdiction case, Case No. 76,437; [*Cheffer v. McGregor*, 6 F.3d 705, 709 (11th Cir. 1993) (*rev'd on other grounds*, 1994 WL 285847)].

2.2 The Defendants, Yvonne Kauger, Robert E. Lavender, Robert D. Simms, Hardy Summers, Joseph M. Watt, Ralph B. Hodges, Rudolph Hargrave, Alma Wilson, and Marian P. Opala, were and are, at all times material to this Complaint, Justices of the Oklahoma Supreme Court who have acted under color of state law.

2.3 Plaintiff sues all Defendants in their official capacities.

III

FIRST COUNT

PLAINTIFF vs. KAUGER, LAVENDER, SIMMS, SUMMERS AND WATT
["Count I Principal Defendants"]
and
HODGES, HARGRAVE, WILSON, AND OPALA
["Count I Nominal Defendants"]
(Declaratory and Permanent, Prospective Mandatory Injunctive Relief)

COUNT ONE BACKGROUND FACTS

3.1 On June 29, 1990, the Oklahoma Coalition to Restrict Abortion, Inc., and Fred W. Sellers, Jr. [the "642 Proponents"] filed their initiative petition pamphlet, including the text of the proposed law, State Question 642 with the Oklahoma Secretary of State.

3.2 During the ninety-day period from June 29, 1990, through September 27, 1990, the petition pamphlets were circulated, and 106,537 signatures were obtained and filed.

3.3 On December 17, 1990, the Oklahoma Supreme Court entered an order, the publication of which started the time period for filing challenges to State Question 642.

3.4 On December 31, 1990, Nancy Feldman and Kim Little filed a protest to the legal sufficiency of the 642 petition, claiming in paragraph 10 of their protest that State Question 642 was unconstitutional.

3.5 On January 4, 1991, Janet Taliaferro, Andrew Tevington, and Pam Fleischaker filed a numerical sufficiency objection to the count claiming that the 642 Proponents had submitted fewer valid signatures than the number required to bring State Question 642 to a vote of the people.

3.6 On March 23, 1992, Feldman and Little filed a brief, which stated:

> [Respondents] hereby withdraw their federal and state constitutional claims.

3.7 Nevertheless, on July 14, 1992, the five Count I principal defendants issued a briefing order requiring the 642 parties to file simultaneous briefs on the constitutionality of State Question 642, i.e., on the content of State Question 642.

3.8 Justice Hodges dissented from the *sua sponte* July 14, 1992, briefing order because neither the 642 Proponents nor the 642 Respondents had requested a constitutional review of the proposed statute.

3.9 Justice Hodges also revealed that, prior to the July 14, 1992, briefing order, an opinion approving the initiative for a vote of the people had been prepared and was being readied for publication, signifying that the 642 Proponents had overcome the Taliaferro/Tevington/Fleischaker objection to the count.

3.10 On July 15, 1992, the 642 Proponents filed a suggestion to the court emphasizing that, on March 23, 1992, Feldman and Little had withdrawn their federal and state constitutional claims, and that the time for filing protests had expired on January 7, 1991.

3.11 Briefs were filed by the 642 parties and the Oklahoma Attorney General, even though the 642 Proponents had filed a motion to disqualify the Attorney General, because the Attorney General's role in an Oklahoma initiative petition proceeding is limited by law to determining whether the proposed *ballot title* is in legal form and in harmony with the law.

3.12 In their July 24, 1992, brief, the 642 Proponents relied on *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988), for the proposition that the expression

attendant to the initiative petition process, from circulation through voting, is core political speech, and cited the Supreme Court's express rejection in *Meyer* of the States' rights argument that, because the initiative is a state-created right, the state may impose limitations on that right.

3.13 On August 4, 1992, the five Count I Principal defendants entered an order in Case No. 76,437 striking State Question 642 "from the ballot." *In re Initiative Petition 349, State Question 642,* 838 P.2d 1 (Okl. 1992).

3.14 The first part of the August 4, 1992, order said that the proposed law, State Question 642, was unconstitutional under the United States Constitution, but suggested:

> [T]he proponents may present a *proper* petition for submission to a vote of the people.

838 P.2d, at page 7 (emphasis added).

3.15 In the second part of the order, the Count I Principal Defendants recognized, but rejected, the core political speech argument raised in the 642 Proponents' July 24, 1992, brief.

3.16 In the second part of said order, the Count I Principal Defendants conceded content review:

> Nothing in this opinion should be read to limit the content *of any petition circulated.* However, if an unconstitutional measure garners enough signatures to be presented to the people and is challenged on constitutional grounds, pre-submission judicial review is appropriate.

838 P.2d, at page 10 (emphasis added).

3.17 In the August 4, 1992, order, the Count I Principal Defendants attempted to justify initiative petition pre-submission content review by stating that a "costly" and "unnecessary" vote of the people could be avoided.

838 P.2d, at 8.

3.18 The Count I Principal Defendants refused to license State Question 642 because of its content.

THE RIGHTS DEPRIVED

3.19 The expression attendant to the initiative petition process, from circulation through voting, is core political speech.

3.20 The Defendants' licensing of a state question based on its content violates the First and Fourteenth Amendments as a prior restraint on core political speech.

3.21 Although a state is not required to provide its citizens with the right of the initiative, the exercise of that right, once created, may not be restricted on the basis of an initiative's content.

3.22 The Defendants' pre-submission, content review of initiative petitions functions as a licensing of political speech, that is a prior restraint on core political speech.

3.23 The burden that must be overcome when attempting to regulate political expression is "exacting scrutiny," that is "well-nigh insurmountable."

3.24 "Costly" and "unnecessary" are not compelling state interests sufficient to survive First Amendment "exacting scrutiny."

3.25 Restrictions on the advocacy for the passage or defeat of initiative petition legislation impose an impermissible burden on political expression in violation of the First and Fourteenth Amendments.

42 U.S.C. § 1983 CLAIM

3.26 The aforementioned acts violate the civil rights of the Plaintiff protected by 42 U.S.C. § 1983.

3.27 The conduct complained of constitutes a violation of Plaintiff's freedom of expression rights guaranteed by the First and Fourteenth Amendments.

3.28 Plaintiff currently suffers the deprivation of those rights by the Defendants' aforementioned actions performed under color of state law [34 O.S. § 8 and OKLA. CONST. art. II, § 1, as construed and applied].

3.29 Plaintiff will participate in the advocacy concerning the passage or defeat of State Question 642 as soon as State Question 642 is licensed.

3.30 The violation of Plaintiff's constitutional rights has caused and will continue to cause Plaintiff to suffer actual and irreparable injury.

3.31 Plaintiff has no adequate remedy at law to correct the continuing deprivation of her constitutional rights.

RELIEF REQUESTED

3.32 Plaintiff requests: (a) declaratory relief holding initiative petition pre-submission content review [based on 34 O.S. § 8 and OKLA. CONST. art II, § 1, as construed and applied] and licensing to be a prior restraint on core

political speech in violation of the First and Fourteenth Amendments, and (b) that a permanent, prospective mandatory injunction issue compelling the Defendants to complete the State Question 642 initiative petition process without reference to the content thereof.

IV

SECOND COUNT

PLAINTIFF v. ALL DEFENDANTS

(Declaratory and Permanent, Prospective Preventive Injunctive Relief)

COUNT TWO BACKGROUND FACTS

4.1 On July 19, 1994, all Defendants issued an opinion in the federal term limits initiative petition original jurisdiction (not appellate jurisdiction) case of:

In re:	)	
INITIATIVE PETITION NO. 360	)	*Case No. 82,648*
STATE QUESTION NO. 662	)	

65 O.B.J. 2546 (Okl. 1994).

4.2 In the State Question 662 case, the Defendants once again performed pre-submission content review and licensing of an initiative petition.

4.3 The Defendants licensed State Question 662 even though the Defendants acknowledged that at least three courts, including a United States Federal District Court, had held similar term limit provisions unconstitutional under the United States Constitution. 65 O.B.J., at 2549.

THE RIGHTS DEPRIVED

4.4 The Plaintiff incorporates the allegations of paragraphs 3.19 through 3.25, *supra.*

42 U.S.C. § 1983 CLAIM

4.5 The Defendants are arbitrarily and capriciously "picking and choosing" the initiative petitions to be licensed for the ballot by focusing on the content of each state question in violation of the First and Fourteenth Amendments, including the equal protection clause of the Fourteenth Amendment [*Police Department v. Mosley,* 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972)].

4.6 Plaintiff incorporates by reference the allegations of paragraph 3.26 through 3.28 and 3.30 through 3.31, *supra.*

RELIEF REQUESTED

4.7 Plaintiff requests: (a) declaratory relief holding initiative petition pre-submission content review [based on 34 O.S. § 8 and OKLA. CONST. art. II, § 1, as construed and applied] and licensing to be a prior restraint on core political speech in violation of the First and Fourteenth Amendments, and (b) that a permanent, preventative injunction issue preventing the Defendants from performing initiative petition pre-submission content review and licensing *in futuro.*

V

PRAYER

Wherefore, Plaintiff prays for judgment as requested in paragraphs 3.32 and 4.7, *supra,* plus an award of costs,

expenses, and reasonable attorneys fees pursuant to 42 U.S.C. § 1988, and all other relief to which Plaintiff may be justly entitled.

MICHAEL MINNIS & ASSOCIATES, P.C.

By /s/ Michael Minnis
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Supreme Court, U.S.
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No. 96-953

In The

Supreme Court of the United States

October Term, 1996

MONICA SKRZYPCZAK,
An Oklahoma Citizen,

Petitioner,

vs.

YVONNE KAUGER, ROBERT E. LAVENDER, ROBERT D. SIMMS, HARDY SUMMERS, JOSEPH M. WATT, RALPH B. HODGES, RUDOLPH HARGRAVE, ALMA WILSON and MARIAN P. OPALA, in their official capacities as Justices of the Oklahoma Supreme Court,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court allow a federal district court to reverse a final decision of the Oklahoma Supreme Court?

2. Should this Court require the State of Oklahoma to place all state initiative petitions on state-wide ballots, without regard to the constitutionality of the proposed legislation?

3. Did the Petitioner have standing to assert these first two questions in a federal district court action?

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STATUTES INVOLVED

1. Title 28 U.S.C.A. § 1257

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

2. Title 28 U.S.C.A. § 1738

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

3. Article 5, Oklahoma Const. § 2.

The first power reserved by the people is the initiative, and eight per centum of the legal voters shall have the right to propose any legislative measure, and fifteen per centum of the legal voters shall have the right to propose amendments to the Constitution by petition, and every such petition shall include the full text of the measure so proposed. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety), either by petition signed by five per centum of the legal voters or by the Legislature as other bills are enacted. The ratio and per centum of legal voters hereinbefore stated shall be based upon the total number of votes cast at the last general election for the State office receiving the highest number of votes at such election.

4. Title 34 Okla. Stat. § 8.

When a citizen or citizens desire to circulate a petition initiating a proposition of any nature, whether to become a statute law or an amendment to the Constitution, or for the purpose of invoking a referendum upon legislative enactments, such citizen or citizens shall, when such petition is prepared, and before the same is circulated or signed by electors, file a true and

exact copy of same in the office of the Secretary of State and, within ninety (90) days after such filing of an initiative petition, the signed copies thereof shall be filed with the Secretary of State, but the signed copies of a referendum petition shall be filed with the Secretary of State within ninety (90) days after the adjournment of the Legislature enacting the measure on which the referendum is invoked. The electors shall sign their legally-registered name, their address, and the name of the county in which they reside. Any petition not filed in accordance with this provision shall not be considered. When the signed copies of a petition are timely filed, the Supreme Court of the state shall make or cause to be made a physical count of the number of signatures appearing on the petitions. Upon order of the Supreme Court it shall be the duty of the Secretary of State to forthwith cause to be published, in at least one newspaper of general circulation in the state, a notice of such filing and the apparent sufficiency or insufficiency thereof and notice that any citizen or citizens of the state may file a protest to the petition or an objection to the count made by the Supreme Court of the state by a written notice to the Supreme Court of the state and to the person or persons filing the petition, said protest to be filed within ten (10) days after publication. In case of the filing of an objection to the count, notice shall also be given to the party filing a protest, if one was filed. The Supreme Court of the state shall then fix a day, not less than ten (10) days thereafter, at which time it will hear testimony and arguments for and against the sufficiency of such petition. A protest filed by anyone hereunder may, if abandoned by the

party filing same, be revived within five (5) days by any other citizen. After such hearing the Supreme Court of the state shall decide whether such petition be in form as required by the statutes. If the Court be at the time adjourned, the Chief Justice shall immediately convene the same for such hearing. No objection to the sufficiency shall be considered unless the same shall have been made and filed as herein provided.

Provided, that whenever reference is made in this act to the Supreme Court of the state, such reference shall include the members of the Supreme Court of the state or any officer constitutionally designated to perform the duties herein prescribed.

COUNTER-STATEMENT OF THE CASE

Like many other jurisdictions, the State of Oklahoma provides that changes to its Constitution and statutes may be introduced by its citizens. Article 5, Section 2 of Oklahoma's Constitution provides for the enactment of state laws through the process of initiative petition. Title 34, Oklahoma Statutes, Section 8 mandates that citizens file a copy of their proposed petition(s) with the Oklahoma Secretary of State and thereafter supply a sufficient number of signatures within ninety days. Any citizen may then file a protest to the petition, which is decided by the Oklahoma Supreme Court.

On June 29, 1990, Fred W. Sellers, Jr. and Oklahoma Coalition to Restrict Abortion, Inc. (hereinafter referred to as "Coalition") filed petition pamphlets with the Oklahoma Secretary of State seeking to put Initiative Petition

349 on a statewide ballot. Said petition sought to restrict a woman's right to an abortion except in certain prescribed instances. During the approval process of Initiative Petition 349, also designated as State Question 642, the United States Supreme Court decided the case of *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), which dealt with the rights of the states to regulate abortions.

On July 14, 1992, the Oklahoma Supreme Court issued an order requiring the Coalition and others to address the constitutionality of State Question 642 in light of *Casey*. On July 24, 1992, the Coalition filed its brief with the Oklahoma Supreme Court discussing the constitutionality of State Question 642 and questioning the authority of the Oklahoma Supreme Court to review the contents of the petition.

On August 4, 1992, the Oklahoma Supreme Court held that State Question 642 was unconstitutional and ordered it stricken from the ballot. The Court ruled:

> [T]hat when the unconstitutionality of the initiative petition is manifest, a pre-election judicial determination of the issue is both appropriate and necessary to avoid a costly and useless election.

In Re Initiative Petition No. 349, 838 P.2d 1, 2 (Okla. 1992).

The Coalition timely filed for a Writ of Certiorari with the United States Supreme Court, which was subsequently denied. *Oklahoma Coalition to Restrict Abortion, Inc. v. Feldman*, 506 U.S. 1071, 113 S.Ct. 1028, 122 L.Ed.2d 173 (1993). Almost two years later, on August 3, 1994,

Monica Skrzypczak, (hereinafter referred to as "Petitioner"), commenced an action in federal district court, suing the nine Justices of the Oklahoma Supreme Court (hereinafter referred to as "Respondents"), in their official capacities. Said suit sought an injunction against the Respondents compelling them to "complete the State Question 642 initiative petition process without reference to the content thereof". [Petitioner's App., p. 28].

The Respondents filed a Motion to Dismiss the action for lack of subject matter jurisdiction. Respondents argued that federal district courts are generally forbidden by Title 28 U.S.C.A. § 1738 from reviewing state court judgments. The only way to challenge a final decision of the Oklahoma Supreme Court is by way of certiorari to the United States Supreme Court as authorized by 28 U.S.C.A. § 1257. Respondents further argued that the ruling of the Oklahoma Supreme Court in *In re Initiative Petition No. 349* was a final order. As such, it was res judicata, was entitled to full faith and credit, and was not subject to collateral attack in federal district court. The District Court adopted the Respondents' arguments and dismissed the action.

A three judge panel of the Tenth Circuit affirmed, but for different reasons. The circuit court found that the Petitioner's original district court complaint "failed to identify a legally-protected interest that has been invaded and thus has failed to allege an injury in fact". [Petitioner's App., p. 7].

ARGUMENT

SUMMARY OF ARGUMENT

The Petitioner is correct when she characterizes the legal arguments and decisions as "moving target[s]". [Petition, p. 7]. The district court and appellate court both made independent examinations into their jurisdiction, as authorized by this Court. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). The district court adopted Respondents' full faith and credit argument, but went on to state that it did not have the power to "grant the injunctive relief plaintiff seeks". [Petitioner's App., p. 14]. This argument had not been raised by Respondents at the district court level and was not addressed by them at the Tenth Circuit.

The Tenth Circuit did not comment on the correctness of the district court's ruling, but instead based its decision on the issue of standing. Respondents have not previously addressed the standing issue, but agree with the legal reasoning and ruling of the Tenth Circuit.

It is the Respondents' position that the Oklahoma Supreme Court has jurisdiction to review the legal validity of state initiative petitions prior to submitting them to a vote of the people. It is also the Respondents' position that all citizens of the State of Oklahoma are bound by the Oklahoma Supreme Court's decision in *In re Initiative Petition No. 349*, 838 P.2d 1 (Okla. 1992). Those Oklahoma citizens with standing to contest this ruling have already done so. The Petitioner's belated action filed in the United States District Court was simply an attempt to relitigate issues which had already been properly decided.

The questions presented for review in the Petitioner's Petition For a Writ of Certiorari do not adequately focus the issues involved in this action. Respondents respectfully assert that the questions propounded at the beginning of this Response more accurately reflect the gravamen of Petitioner's complaint, and more concisely show the reasons why certiorari should not be granted. The previous rulings of the district court and court of appeals do not conflict with other jurisdictions. Nor do said rulings depart from the accepted and usual course of judicial proceedings.

REASONS FOR DENYING THE WRIT

Meyer v. Grant

The Oklahoma Supreme Court struck State Question 642 from a state-wide ballot because it was patently unconstitutional. Petitioner contends that said decision was contrary to this Court's holding in *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988). However, as noted by the Tenth Circuit, the facts in *Meyer* are not controlling in this instance. In *Meyer*, this Court held that the State of Colorado could not prohibit the use of paid initiative petition circulators. Oklahoma does not have such a prohibition. The manner in which the petition was circulated was not at issue.

More importantly, the present challenge to the Oklahoma Supreme Court's ruling was brought by a stranger to the initiative petition process. The Petitioner neither submitted State Question 642, nor did she litigate its validity before the Oklahoma Supreme Court. Petitioner

filed her challenge to the Oklahoma Supreme Court's ruling in federal court almost two years later. The federal district court realized that the only way to challenge a final decision of the Oklahoma Supreme Court is by way of certiorari to the United States Supreme Court as authorized by 28 U.S.C.A. § 1257. The ruling of the Oklahoma Supreme Court in *In Re Initiative Petition No. 349* was a final order. As such, it was entitled to full faith and credit and was not subject to collateral attack in federal district court.

Picking and Choosing

Petitioner has suggested in her Petition For a Writ of Certiorari that the Oklahoma Supreme Court is "picking and choosing" among initiative petitions based upon their content. This statement is incorrect to the extent that it implies that other patently unconstitutional petitions have been approved by the Oklahoma Supreme Court. The case of *In re Initiative Petition No. 360, State Question No. 662*, 879 P.2d 810 (Okla. 1994), cited by the Petitioner, does not support her argument. *In re Initiative Petition No. 360* was decided by the Oklahoma Supreme Court prior to this Court's ruling in *United States Term Limits v. Thornton*, ___ U.S. ___, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995). In *In re Initiative Petition No. 360* the Oklahoma Supreme Court approved an initiative petition which sought to limit the terms of Oklahoma's United States senators and representatives.

> "Based on the submissions in this case, we are unconvinced both that the constitutional infirmities lodged by protestants are clear or manifest, or that reaching the merits of those

> challenges would prevent the holding of a costly and unnecessary election. Accordingly, we decline to reach the constitutional challenges lodged by protestants in this case.
>
> Furthermore, we believe another reason militates against deciding definitively the constitutional issue based on the exclusivity of the qualification clauses of Art. I of the United States Constitution. On June 20th of this year the United States Supreme Court granted certiorari in the *U. S. Term Limits, Inc.* case. *U. S. Term Limits, Inc. v. Thornton and Hill*, ___ U.S. ___, 114 S.Ct. 2703, 129 L.Ed.2d 832 (1994). The questions presented include the qualification clause arguments advanced by protestants in this case . . .
>
> In our view, in light of the United States Supreme court's pending determination of this issue . . . it is the better practice to allow a vote of the issue to go forward . . .

In re Initiative Petition No. 360, State Question No. 662, 879 P.2d at 815, 816.

The constitutionality of Initiative Petition No. 360 was not clearly decided until after this Court's ruling in *U. S. Term Limits v. Thornton*, ___ U.S. ___, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995). Had the Oklahoma Supreme Court made its ruling after *United States Term Limits v. Thornton*, the Petitioner's "picking and choosing" argument might have merit. But that is not the case.

The Oklahoma Supreme Court reviews all initiative petitions. As recently as last month, in the case of *In re Initiative Petition No. 364, State Question No. 673*, 1996 WL 709162, 67 Okla.B.A.J. 3874 (Okla. 1996), the Oklahoma

Supreme Court struck an initiative petition from the ballot which would have required all members of the Oklahoma congressional delegation to seek a constitutional convention to require federal term limits. The Court held that the proposed measure was constitutionally invalid.

> We conclude that the measure is facially violative of the constitutions of Oklahoma and the United States and may not be placed on the ballot for submission to the people.

In re Initiative Petition No. 364, State Question No. 673, 1996 WL 709162, p. 2. Had the Oklahoma Supreme Court allowed the question to be put on the ballot, the Petitioner's "picking and choosing" argument might have merit. But again, that is not the case.

American Booksellers

Petitioner contends that the Tenth Circuit's ruling was contrary to this Court's holding in *Virginia v. American Booksellers Assn.*, 484 U.S. 383, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988). However, the facts in *American Booksellers* are not controlling in this instance. *American Booksellers* involved a Virginia statute making it unlawful for any person to display materials harmful to minors for commercial purpose, in a manner whereby juveniles could examine and peruse said materials. An action was brought by booksellers alleging that the law violated their rights and the rights of their customers. This Court allowed the booksellers to assert the first amendment rights of their customers, but only after finding that the plaintiffs themselves were threatened with actual injury.

In its ruling, the Court in *American Booksellers* cited the case of *Secretary of State of Maryland v. J. H. Munson Co.*, 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). The complaint in *Munson* was filed by a professional for-profit fundraising organization challenging a Maryland state statute which limited the rights of charitable organizations to raise funds. Even though the statute was directed at charitable organizations, the Court held that the for-profit company had standing. The Court noted that "[T]he crucial issues are whether Munson satisfies the requirement of 'injury-in-fact,' and whether it can be expected satisfactorily to frame the issues in the case." *Secretary of State of Maryland v. J. H. Munson Co.*, 81 L.Ed.2d at 797. The Court did not waive the injury-in-fact requirement, but merely allowed that party sustaining the injury to bring an action to protect the rights of others.

CONCLUSION

In the case of *In Re Initiative Petition No. 349*, 838 P.2d 1 (Okla. 1992) the Oklahoma Supreme Court ruled that State Question 642 was unconstitutional and refused to put it on a state-wide ballot. The proponents of State Question 642 had vehemently argued that such an action by the court would be an impermissible prior restraint on core political speech in violation of *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988). Two years later Petitioner made the same arguments in a federal district court action. The district court correctly ruled that it did not have jurisdiction to review a final decision of the Oklahoma Supreme Court. The Tenth Circuit subsequently held that Petitioner lacked standing to bring the

action because she had not alleged an injury-in-fact. These rulings of the District Court and Tenth Circuit are not in conflict with other jurisdictions or the Supreme Court. Respondents respectfully request that certiorari be denied.

Dated, Oklahoma City, Oklahoma, January 13, 1997.

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